United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 12, 2001

TO : Wayne Gold, Regional Director
Region 5

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Richmond Newspapers, Inc., Richmond Times Dispatch
Case 5-CA-29157

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This case was submitted for advice on whether the Employer discriminatorily enforced its rules regarding employee use of e-mail and computers, and whether the rules are otherwise unlawfully over broad.

The Union represents 185 employees in the Employer's newspaper. Unit employees spend the majority of their work time on the company computers, using both e-mail and company access to the internet to research and produce stories. Employees also make personal use of company e-mail, e.g., posting notices about baby showers, retirement parties and the United Way campaign, sending jokes and stories, and advertising concert tickets. There is no evidence that any employee has ever received any discipline for personal use of e-mail.

The parties' prior bargaining agreement expired in September 2000 and the parties met for new contract negotiations on July 13, 2000. At that meeting, the Employer advised Union President Pope that he should not use the Employer's e-mail system to send Union bulletins or other notifications. A week later, the Employer sent a letter to Pope stating:

> As we have told you on several occasions over the past couple of years, the company's e-mail and computer systems are not available for personal use and/or for outside organizations . . .

Pope freely admits that since approximately 1998, he has received similar warnings from the Employer prohibiting use of e-mail and other computer systems for union business. Pope states, however, that he ignored all the previous warnings and continued to use the Employer's systems for

these purposes. Pope states that he sent e-mails to unit employees apprising them of Union and other employment matters such as the expiration of the former bargaining agreement, pay raise notices, and Union meetings. Moreover, despite the July 2000 warnings, Pope and other members of the Union's negotiation committee have continued to use the computers and e-mail for Union business, including sending employees negotiation updates.

The Union filed a Section 8(a)(1) charge alleging that the Employer's July 2000 warning to Pope disparately and discriminatorily enforced its e-mail policies against union business.[1] Although this charge did not specifically allege that the Employer's specific e-mail and computer rules are unlawfully over broad, the Union is not opposed to pursuing those rules if they are found unlawful.

The Employer has several policies in its employee handbook regarding computer and e-mail use. First, a provision entitled "Computer Equipment" states:

> The computers . . . are business equipment. . . use of this equipment for personal, or any other purpose other than the Company's business, must be approved by the Department Head.

Second, a provision entitled "Computer Security" essentially requires the same prior approval. This provision also specifies that prohibited non-business use "includes, but is not limited to, playing computer games or using our typesetting system for personal profit."

Third, a provision entitled "Internet Access and Usage" states:

> Use of any on-line service (e.g., America Online, MSN, AT&T, Mind Spring, etc.) must be approved by the Department Head . . . Use of the Internet for any non-business related purpose, without the knowledge and consent of the Department Head, is prohibited.

A fourth provision entitled "Electronic Mail Policies" states:

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[1] The Union also filed a Section 8(a)(5) charge alleging that the July 2000 warning was a unilateral change from the past practice of permitting such e-mail use. We agree with the Region that the Employer did not unilaterally change its practice because in the past it repeatedly warned Pope against e-mail use for union communications.

> The e-mail system is provided to employees at Company expense to assist them in carrying out the Company's business . . . The Company treats all messages . . . as property of the Company . . .Confidentiality of e-mail messages will be the norm . . . Should employees make incidental use of the e-mail system to transmit personal messages, such messages will be treated no differently from other messages. (Emphasis added).

We conclude, in agreement with the Region, that Employer discriminatorily enforced its rule regarding employee use of e-mail.

The Employer's enforcement e-mail policy is unlawful because the Employer regularly permits other similar, non-business use of e-mail, but will not permit its use for union activity. The policy thus is clearly violative under E.I. du Pont de Nemours & Co.,[2] where the Board held that an employer violated Section 8(a)(1) by discriminatorily prohibiting employees from using e-mail for union business while allowing employees to use e-mail concerning a wide variety of non-union subjects.

Regarding the four Employer rules concerning computer, e-mail and internet use, the evidence arguably establishes that both the Employer's e-mail network and its access to the internet comprise a sufficiently significant aspect of the employees' work life to constitute a "work area".[3] However, the contract provision entitled "Electronic Mail Policies" not only fails to clearly prohibit personal use of e-mail, the Employer in fact has tolerated personal e-mail use. After the Employer's discriminatory enforcement of its e-mail policy is remedied, e-mail will be permitted for both personal and union matters. In these circumstances, we would not argue that the e-mail policy nevertheless is still unlawfully over broad as prohibiting e-mail use for Section 7 matters.

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[2] 311 NLRB 893, n. 4 (1993).

[3] See Pratt & Whitney, Case 12-CA-18446, et al., Advice Memorandum dated February 23, 1998; TU Electric, Case 16-CA-19810, Advice Memorandum dated October 18, 1999; and Bureau of National Affairs, Case 5-CA-28860, Advice Memorandum dated October 3, 2000. Cf. TEK Systems Management, et al., Cases 21-CA-33204, Advice Memorandum dated October 21, 1999, at p. 5, note 9 (evidence insufficient to demonstrate internet use amounted to an employee work area.)

Regarding computer use for internet access, the remaining rules do not bar personal use of the internet, and instead require prior approval. Once the Employer's discriminatory enforcement of its e-mail policy is remedied, employees may no longer reasonably believe that the Employer is nevertheless barring use of the Internet for Union purposes. In these circumstances, it would be problematic to argue that the "prior approval" condition is an over broad restriction on internet use for Section 7 activity.

In any event, the Union has not yet filed an allegation attacking the over breadth of these remaining rules. [*FOIA Exemption 5*

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B.J.K.